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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1983

BISCAYNE FEDERAL SAVINGS & LOAN ASSOCIATION and KAUFMAN & BROAD, INC.,
Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Where the district court found that the federal agency acted arbitrarily, capriciously, and outrageously in appointing a receiver for petitioner Biscayne Federal Savings and Loan Association, did the court of appeals err in holding such conduct was not subject to judicial review?

STATEMENT PURSUANT TO SUPREME COURT RULES 21.1(b) AND 28.1

Pursuant to this Court's Rule 21.1(b), petitioners state that the adverse parties appearing in the court of appeals were the respondents here, the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation. In the district court, the parties were, in addition to respondents: New Biscayne Federal Savings and Loan Association, Richard T. Pratt, Edward Gray, Jamie Jackson, Thomas P. Vartanian, D. James Croft, H. Brent Beesley, Stanley Warranch, Charles T. Babcock, Jr., Kenneth Kamberg, R. Bruce Ricks, and Ray M. Shaw.

Pursuant to this Court's Rule 28.1, the listing of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates for each of the Petitioners is found in Appendix F (App. 181).

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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Petitioners Biscayne Federal Savings & Loan Association and Kaufman & Broad, Inc. respectively pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered November 29, 1983.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 720 F.2d 1499. The district court's opinion on the merits (App. 18) is reported at 572 F.Supp. 997, and its opinion of April 12, 1983 (App. 144) is reported at 561 F.Supp. 1046. The district court's opinion of May 6, 1983 (App. 153) is unreported.

JURISDICTION

The judgment of the court of appeals was entered November 29, 1983 (App. 162), and amended December 5, 1983 (App. 164). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

As the pertinent statutory provisions are lengthy, they are set forth at App. 166-80. This case arises under the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §§ 1461 *et seq.* (1982). Also cited are sections 401(d) and 406 of the National Housing Act, as amended, 12 U.S.C. §§ 1724(d) and 1729 (1982), and a portion of the National Bank Act, as amended, 12 U.S.C. § 191 (1982).

The due process clause of the Fifth Amendment to the United States Constitution provides "nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE[1]

This case squarely presents the question whether arbitrary and capricious agency conduct will be immunized from judicial review, despite this Court's historic condemnation of "administrative absolutism." *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 157 (1970).

The case arises from the Federal Home Loan Bank Board's appointment of a receiver for petitioner Biscayne Federal Savings & Loan Association. Proceeding under 12 U.S.C. § 1464(d)(6)(A), the district court held that the Bank Board acted arbitrarily, capriciously, and outrageously, and directed the parties to submit a plan for the orderly return of the institution to petitioners. App. 115-25. Recognizing that the district court had found "the Board's conduct . . . 'outrageous,' 'outlandish,' 'egregious' and 'wrapped in a shroud of deception,'" *id.* at 6, the Eleventh Circuit held such conduct was, as a matter of law, beyond the authority of the district court to review. *Id.* at 6, 8, 9, 12, 17 n.12. The court of appeals directed entry of judgment for the Bank Board, *id.* at 14, thus approving the taking of some $30 million in value from Biscayne's 1,467 record shareholders. Tr. 1209-10; DX 7, Tab 8, at 43.

In the Eleventh Circuit the Bank Board was joined by the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the National Credit Union Administration, urging that the issue presented was one of major significance for the financial regulatory scheme. Review is sought here by Biscayne for precisely the same reason: the extraordinary

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[1]Citation abbreviations are Appendix ("App."); Trial Transcript ("Tr."); Plaintiffs' Exhibit ("PX"); Defendants' Exhibit ("DX"); Record ("R.").

Other abbreviations are petitioner Biscayne Federal Savings & Loan Association ("Biscayne"); petitioner Kaufman & Broad, Inc. ("Kaufman & Broad" or "KB"); respondent Federal Home Loan Bank Board ("Bank Board" or "FHLBB"); respondent Federal Savings and Loan Insurance Corporation ("FSLIC").

impact of the federal question presented—for the regulatory scheme, for the investing public, and for this Court's leading administrative decisions. The court of appeals' view— that federal law permits arbitrary seizures of property—is at odds with our jurisprudence, and is an unusually important federal question which should be resolved by this Court.

The facts of this case are set forth in the district court opinion at App. 32-87, 115-23. In capsule, the case stems from "serious agency abuses," *id.* at 27, in which the Bank Board (consisting at most times of two Board members and agency staff) repeatedly obstructed petitioners' efforts to add additional capital to Biscayne Federal Savings & Loan Association and then seized the institution because it had not been recapitalized, thereby "clearing" the "cloud" of shareholder title and allowing the agency to deliver the association to a larger, out-of-state financial institution. *See infra* pp. 5-11.

Biscayne had been founded in 1956 with assets of $800,000. App. 33; DX 72, at 2. Regularly posting a profit, *see* App. 3, Biscayne grew to be the nation's 44th largest savings and loan association, with assets of $1.8 billion. DX 72 at i, 2. Biscayne was listed on the New York Stock Exchange, and its shares were widely held, the majority by small shareholders. *Id.* at i; DX 8, Tab 4, at 1; *see* DX 7, Tab 18, at 73.

In 1978-82 savings and loan associations suffered industrywide losses at dramatic rates, because deregulation and high prevailing interest rates caused savings and loan expenses to outpace income. App. 34-36. On the basis of fair market value, by 1982 the entire industry had a *negative* net worth of $50 to $150 billion. *Id.* at 36. "Caught up amid the industry upheaval, Biscayne in July 1981 reported the first annual loss in its history, and its positive net worth of $31,850,000 began to erode." *Id.* at 3.

Beginning in the fall of 1981, petitioners undertook efforts to infuse additional capital, an undertaking in which they had expertise. Biscayne's founding management had successfully converted the association from a mutual to a stock institution in 1976. *Id.* at 33. Biscayne's largest shareholder (25%), Kaufman & Broad, Inc., is itself traded on the New York Stock Exchange, and has $1 billion in assets. *Id.* at 34; DX 7, Tab 8, at 32.[2]

Biscayne's efforts to raise capital necessarily involved the Bank Board, for "Board approval was a prerequisite for any action taken by Biscayne during the relevant period of negotiations . . . ." App. 6. In early 1982 petitioners twice believed they had reached agreement on a recapitalization proposal with the Bank Board, only to learn in each instance the Bank Board had not agreed. *Id.* at 43, 45-49.

Then, in July, 1982, Biscayne entered a contract to sell some of its branches to raise capital. App. 49.[3] "Biscayne did not seek one cent of FSLIC money as part of that proposal." *Id.* at 60. Both the government and Biscayne believed that the branch sale would generate the required capital, *id.* at 49, and the transaction was structured in accordance with an accounting approach suggested by the agency. *Id.* at 51, 54, 60-61. Biscayne's accompanying plan to engage in mortgage banking, *id.* at 51, would have protected the institution from future interest rate shifts. Tr. 381-85.

Reviewing what ensued, the district court found a pattern of conduct "which can only be described in its totality as outrageous . . . ." App. 118. Over a period of five months

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[2]The court of appeals incorrectly described Kaufman & Broad as the majority shareholder of Biscayne; it is actually a 25% shareholder. *Compare* App. 3 *with* App. 34.

[3]The initial branch sale contract was superseded in August, 1982 by a branch sale agreement with a different party. App. 49.

Biscayne ran a gauntlet of Bank Board objections, *id.* at 50-62, during which "Biscayne went from a mere $3.93 million negative net worth to the very substantial sum of $22.50 million negative net worth." *Id.* at 60.[4] On January 5, 1983, the staff indicated it "would not recommend the branch sale as it had been structured," and that it should be modified in two particulars. *Id.* at 119. But when Biscayne agreed "to meet the staff's demands," that, too, was insufficient. *Id.* at 120. The branch sale contract "was due to expire on January 31, 1983." *Id.* at 71. Although Biscayne pressed the agency orally and in writing, the staff refused to set forth conditions on which the branch sale would be approved, *id.* at 120—a refusal the district court found to be "without justification." *Id.*

The district court reached "the inescapable conclusion that the [Bank Board] staff wanted the branch sale to expire . . . without the appearance that the failure to gain approval was due to FHLBB misconduct," *id.* at 120, and in order to avert potential legal liability. *Id.* at 71. "One hundred and fifty-eight days had now elapsed and FHLBB still had Biscayne shadow boxing in its own lightless bank vault." *Id.* at 62.

"The evidence is clear that by the end of January, but before January 31, the negotiations were wrapped in a shroud of deception." *Id.* at 121. The agency expressed a preference for a different recapitalization proposal, which

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[4]Among other obstacles, the Bank Board followed an "irregular" procedure to evaluate the viability of the Biscayne proposal. App. 57. Based "on a 'clearly mistaken assumption' which yielded 'meaningless results,'" *id.* at 58, the agency's ten-year forecast showed a Biscayne failure with a negative net worth of $508 million, while Biscayne forecast financial recovery with a positive $96.4 million net worth at the end of the same period. *Id.* at 57. Although the Bank Board projection was "devastating . . . to Biscayne," *id.* at 58, the agency made no attempt "to understand KB's [Biscayne] projections; no effort was made to determine why [the agency] results differed so radically from Biscayne, even after KB requested a meeting for that purpose." *Id.* at 57; see *id.* at 119. Certain other Bank Board objections to the branch sale were "totally erroneous." *Id.* at 55; *see id.* at 119.

had been prepared by Kaufman & Broad as an alternative "in case the branch sale was deemed to be unacceptable." *Id.* at 119. This agency preference was paradoxical, for it required a nonrepayable capital investment by FSLIC and Kaufman & Broad, *id.* at 62-63, while the branch sale required no government funds whatsoever. *Id.* at 60. The court found the agency sought "to have the branch sale fade away and have plaintiffs abandon the [branch sale] proposal altogether . . . ." *Id.* at 121. In January the Bank Board Chairman, and on February 2, the Board itself (consisting at that time of only two members, Pratt and Jackson) in closed session directed the staff to proceed. *Id.* at 65-68, 72-73.

It "was essentially a charade." *Id.* at 123. From the start, the new recapitalization approach rested on several basic premises. First, "the nonrepayability . . . [of the FSLIC capital contribution] will not be a problem for either the staff to recommend or for the Board to approve." *Id.* at 69; *see id.* at 72-73. Second, the recapitalization would be accomplished without the agency "shopping" the institution, that is, without soliciting bids for possible acquirors. *Id.* at 72-73; *see id.* at 135 n. 23, 138 n.28. These premises, on which the proposal went forward, were eventually the reasons stated by the Bank Board for rejecting the proposal. *Id.* at 85-86.

The third premise, and a major "deception," *id.* at 121, was the staff recommendation. The district court found the staff, "with the Board's *de facto* blessings," *id.* at 115, occupied a crucial position. *Id.* at 115-18. "While the Board has on occasion modified a staff recommendation which favored a particular matter, the Board has never, in the memory of all the witnesses who testified, approved of a matter that the staff presented without a recommendation or with a negative recommendation." *Id.* at 67. The district court found that before the end of January, "[t]he staff directors knew that they would not recommend the proposal. At the same time, they led Plaintiffs to believe that a recommendation would be given and that the Board, based on [Chairman] Pratt's

representations . . . would approve the proposal." *Id.* at 121.

The "charade," *id.* at 123, went forward. "The parties continued to meet and exchange comments concerning the proposal for the balance of February and the beginning of March." *Id.* at 74. From January to April 1983, while the new recapitalization was pending, Biscayne's net worth declined from negative $22.50 million to negative $30 million. *Id.* at 39, 60. Meanwhile, "[d]espite the staff's attempt to have Plaintiffs abandon the branch sale, Plaintiffs negotiated an extension . . . [O]n at least two separate occasions in February KB requested for the branch sale to be approved should the recapitalization proposal prove unsatisfactory . . . ." *Id.* at 122. On March 4, 1983 the proposed buyer of the branches terminated the contract, citing the absence of Bank Board approval of the transaction. *Id.* at 75-76; DX 7, Tab 23.

On March 15, "[f]or the first time in two months of negotiations, it was indicated that there would not be any recommendation by the Office Directors to the Board with respect to the KB proposal." App. 76-77. On March 17 a closed Board meeting was held. *Id.* at 77. Although no official decision was made at that session, " 'the die was cast,' " *id.* at 79, and by March 23, "regardless of the testimony of the Board members, . . . [t]he decision on the KB Proposal was a *fait accompli*." *Id.* at 84. All alternatives short of seizing the institution were deleted "from favorable consideration . . . . " *Id.* at 86; *see id.* at 83-84.

The FHLBB's staff memorandum on Biscayne viewed receivership as a tool to wipe out shareholder property interests, by " 'clearing title' to the business of Biscayne and allowing it to be marketed without the cloud created by a 'shareholders rights' issue." DX 8, Tab. 4, at 3. So far as the agency was concerned, the shareholders had no rights; FHLBB litigation counsel told the district court: "What does not exist, perhaps at this point, but maybe it did not exist months ago, is any property rights of the shareholders."

Tr. of Hearing, April 6, 1983, at 26. An agency internal options paper, App. 81, explained that receivership offered an opportunity to scramble the eggs and impede the courts:

> [T]he FSLIC is in the best position if it has appointed a receiver who has already transferred Biscayne's assets and liabilities to a new association *because it is much more difficult for a court to unscramble that transaction than to remove a conservator from possession of Biscayne.*

Id. at 82 (emphasis added).

The same options paper recognized that the appointment of a receiver "exposes the Bank Board to the risk that a court may find that the Bank Board has acted unreasonably under the circumstances," *id.*, and creates "a need to explain what circumstances make the appointment necessary now." *Id.* Staff meeting notes reflected the general counsel went so far as to "hope for a run" by depositors which would create the pretext for seizure of the institution:

Wednesday:	Turn down deal. No decision to close. Biscayne issues press release. Board suspends trading.
Thursday:	Hope for run.
Friday:	Close (if run).

PX 116 at B-5398.

On April 6, 1983, having conducted the entire 3-month recapitalization negotiation on the premise that "the nonrepayability . . . [of FSLIC assistance] will not be a problem for either the staff to recommend or for the Board to approve," App. at 69, 72-73, the Board rejected the proposal precisely because the assistance was nonrepayable. *Id.* at 85. It was also rejected because the proposal had not been

shopped, *id.* at 85-86, even though the recapitalization had from the start been pursued on the premise that shopping was unnecessary, *id.* at 73, and "the need to shop the proposal . . . was never discussed by the staff with KB" while the recapitalization was pending. *Id.* at 86.

Having kept petitioners from curing the insolvency, the Board then appointed a receiver because the institution was insolvent. *Id.* at 87. The Board also said the institution was "in an unsafe and unsound condition to transact business," *id.*, but chose not to support that charge at trial, *id.*, nor could it: the district court found "that Biscayne did not suffer from a liquidity crisis and that it had a present ability to meet depositor demands for funds and other obligations as they became due." *Id.* at 38.[5] No charge of mismanagement was made.[6]

[5]If negative net worth constitutes an unsafe or unsound condition, then the entire industry was subject to seizure, for the entire industry had a negative net worth when measured by fair market value. *See supra* p. 4. The Bank Board has later stated that "unsafe or unsound condition to transact business," 12 U.S.C. § 1464(d)(6)(A)(iii), in fact comes into play where an institution is illiquid, *see* Brief for the Respondents in Opposition at 10-11 n.4, *Telegraph Savings & Loan Ass'n v. Schilling*, 104 S. Ct. 484 (No. 83-244) (denial of certiorari), a situation not involved in Biscayne.

The staff options paper of March 23, App. 81, conceded, "[T]he only ground for the appointment of a . . . receiver is Biscayne's insolvency," *id.* at 82, but noted the Board's litigation posture "would be stronger if it was able to point to circumstances in addition to Biscayne's insolvency." *Id.* at 83. By April 6, "unsafe and unsound condition" had been added to the grounds for appointment. *Id.* at 87.

[6]DX 10 at 368 ("The Board did not find—in its appointment . . . that there were unsafe and unsound practices") (deposition of L. Hayes, Senior Associate General Counsel, FSLIC). The statute distinguishes between, on one hand, "unsafe or unsound condition" and, on the other hand, "unsafe or unsound . . . practices," "violations of law, rules, or regulations," and the like. *Compare* App. 87 *and* 12 U.S.C. § 1464(d)(6)(A)(i), (iii) (App. 167) *with* 12 U.S.C. § 1464(d)(6)(A)(ii), (iv), (v) (App. 167). *See also* PX 163, at 35 (agency "indicated they were satisfied with the management team") (deposition of George Murphy, Biscayne counsel on branch sale.)

Although not a basis for the district court's ruling, the court was "somewhat troubled" by erasures on the tape of the April 6 Bank Board meeting. App. 133 n.13. The Board "did not offer an explanation to the Court as to how such erasures could have happened unintentionally." *Id.*

Expert testimony revealed the institution was at the time of seizure valued at a positive $30 million, notwithstanding its negative net worth—a figure independently confirmed by the successful bid of a Citicorp subsidiary to buy Biscayne from the receiver. Tr. 1209-10; R. 1795-96; FHLBB Res. No. 83-705. Although Biscayne was seized on the basis of negative net worth, one week later the Bank Board distributed to potential buyers an investment analysis saying net worth was "a bookkeeping entry," *not* an essential measure of financial condition, and that Biscayne was strong in the relevant indicators of liquidity and savings. PX 123, § 6, *Wertheim Report* at 3; *see* App. 38.[7]

Within an hour after adopting its resolutions on April 6, the Bank Board took over the Association and, as the internal memoranda had suggested, "scrambled" the matter by immediately transferring the assets and liabilities to New Biscayne Federal Savings & Loan Association, a newly chartered federal mutual savings and loan association. App. 19; *see id.* at 82.

The same day petitioners brought the present action in the United States District Court for the Southern District of Florida, Biscayne proceeding on its own behalf and Kaufman & Broad on behalf of all shareholders. *Id.* at 19; R. 837. Pursuant to 12 U.S.C. § 1464(d)(6)(A), petitioners requested removal of the receiver and return of the association. App. 19.

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[7] It may seem puzzling that an institution with a negative net worth could have a positive market value. This occurs because, to quote the Bank Board, " 'if the reported financial picture equates to reality, it is purely coincidental.' " Tr. 1113. In an inflationary environment the current value of assets fluctuates from the value shown on the balance sheet, Tr. 1213-14, and the balance sheet does not necessarily reflect the profitmaking potential of the institution. *See id.* at 1191-1210.

Citicorp's bid for Biscayne consisted of a variable formula. R. 1795-96. Given a negative $30 million net worth for Biscayne on April 6, 1983, the formula would generate a *positive* $30 million payment by Citicorp to purchase the institution as of that date. *Id.*

Commencing April 28, 1983, some three weeks after the seizure, the district court conducted an expedited bench trial of 17 days, and on September 9, 1983 issued a 125-page memorandum opinion ruling in petitioners' favor. *Id.* at 18. The court decided against petitioners on four alternate counts. *Id.* at 125.

The threshold question addressed by the court was whether the Bank Board's administrative decision to appoint a receiver was subject to judicial review. *Id.* at 25. The Home Owners' Loan Act provides five grounds for the appointment of a receiver, including balance sheet insolvency. 12 U.S.C. § 1464(d)(6)(A) (App. 167). The operative portion of the statute then provides:

> If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association.

Id.

From this it follows that two steps are necessary to appoint a receiver: (1) Is the Board of the "opinion" that a "ground" exists? (2) If so, shall a receiver be appointed? In Step Two, the Board is authorized, but not required, to make an appointment.

The statute next provides:

> In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court . . . for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver.

Id. The statute also establishes the generic proposition that, "Except as otherwise provided herein, the Board shall be subject to suit . . . by any federal savings and loan association . . . *with respect to any matter under this section* . . . ." 12 U.S.C. § 1464(d)(1) (App. 166) (emphasis added).

The Bank Board agreed that Step One was subject to judicial review, but urged that "the FHLBB's decision to appoint a receiver, once one of the criteria is met, is . . . beyond . . . judicial scrutiny." App. 25 (citation omitted). Acknowledging the judicial decisions interpreting the statute were conflicting, *id.* at 25-26, the district court rejected the Bank Board's position. Quoting another federal decision, the district court said:

> "This court is not to substitute itself for the Federal Home Loan Bank Board in the decision to exercise its jurisdiction, if it is present. Rather, once the court determines that the . . . statutory prerequisites have been satisfied, *it will not disturb the decision of the Board to exercise its jurisdiction unless there has been an abuse of discretion in the exercise of that power.*
>
> Therefore the issues before this court are (1) whether, when looking at all the evidence that was available to the Board and that information subsequently discovered, the . . . statutory prerequisites were satisfied, and (2) *whether the Board's exercise of jurisdiction constituted an abuse of discretion.*"

Id. at 26-27 (emphasis in district court opinion; citation omitted). It had been stipulated that Biscayne was insolvent on a balance sheet basis as of April 6, 1983. *Id.* at 25. Step One, a statutory prerequisite for receivership, had therefore been satisfied. *See* 12 U.S.C. § 1464(d)(6)(A).

With regard to Step Two, the district court held the Bank Board had acted arbitrarily and capriciously in appointing a receiver, and directed the parties to submit a plan for the orderly return of the institution to petitioners. *Id.* at 123-24. While Biscayne worked toward a transition plan for "recapitalization of the institution by private capital and by sale of certain assets of the institution," Tr. of Hearing, Nov. 8, 1983, at 9, the Bank Board took an expedited interlocutory appeal.

On November 29, 1983 the Eleventh Circuit reversed, holding that the statute precludes judicial review once a statutory ground for receivership is met. App. 2, 6, 8. The court of appeals conceded "[t]he statute . . . does not expressly define the scope of judicial review" but said, without elucidation, the limits were "apparent." *Id.* at 8. Where the district court had found conflicting judicial precedents, the court of appeals found harmony, saying preclusion of review was supported by three earlier decisions and by this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). App. 9-12.[8] Biscayne had by cross-appeal presented an alternative ground for affirmance: that the statutory scheme, and this Court's decision in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-31 (1962), forbid seizure where a less drastic remedy will suffice. The court of appeals' preclusion of review subsumed the cross-appeal as well. App. 13. The

[8] The court of appeals recognized the agency had refused "to seriously consider proposals . . . to alleviate Biscayne's financial crisis," App. 6, and that "Board approval was a prerequisite for any action taken by Biscayne . . . ." *Id.* Despite this, and the exhaustive factual presentation by the district court, the court of appeals could discern "no finding by the trial court that the Board's 'outrageous conduct' in any way contributed to Biscayne's insolvent status as of April 6 . . . ." *Id.* at 9.

court of appeals directed entry of judgment for the Bank Board.[9]

REASONS FOR GRANTING THE WRIT

First, this case presents an important federal question of national significance. Second, the court of appeals decision is in direct conflict with applicable decisions of this Court and the clear intent of Congress. Third, conflicts of the most confusing sort exist among the courts of appeals and district courts on the reviewability of a receivership appointment for a financial institution.

1. The Decision Below Sets A Precedent For Insulating Arbitrary and Capricious Agency Behavior From Judicial Review, And Creates Uncertainty In The Financial Markets, Placing At Least $3 Billion In Shareholder Investment At Risk.

The importance of this decision is revealed in part by the fact that, in addition to the Bank Board, three other

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[9] In its appeal, the Bank Board had also urged that the agency had not acted arbitrarily and capriciously and that the factual findings were clearly erroneous. Because of its holding that judicial review is precluded, the court of appeals did not reach those issues. The court did, however, effectively reject the argument that the agency had not acted arbitrarily; the court observed that the conduct described by the district court was "shocking," and if supported by the record, should not be approved or condoned. App. 17 n.12.

The Eleventh Circuit mandate was issued simultaneously with its opinion, and the judgment was amended *sua sponte* December 5, 1983. App. 162, 164. Petitioners' motion for recall of mandate, and a stay of mandate pending submission of this petition for writ of certiorari, was denied December 20, 1983. Although the receiver has since transferred Biscayne to Citicorp, remedies remain available. *See* Tr. of Hearing, April 6, 1983, at 29, 45-48 (FHLBB: transaction "voidable"; restoration can be ordered); *Arnett v. Kennedy*, 416 U.S. 134, 189-90 (1974) (White, J., concurring in part and dissenting in part) (Government stands ready to make whole the party wrongfully deprived of property); *Fidelity Savings & Loan Ass'n v. FHLBB*, 540 F.Supp 1374, 1385-87 (N.D. Cal. 1982), *rev'd on other grounds*, 689 F.2d 803 (9th Cir.), *cert. denied*, 103 S.Ct. 1893 (1983) (actions taken under receivership voidable).

federal agencies—the Federal Deposit Insurance Corporation ("FDIC"), the Comptroller of the Currency ("OCC"), and the National Credit Union Administration ("NCUA")—urged reversal of the district court decision, citing the significance of the case for the federal administrative scheme.[10] Each of those agencies presently believes its receivership decisions are totally or substantially exempt from judicial review, and three of the four rely for that proposition on this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).[11]

The agencies' position is directly at odds with the intent of Congress and this Court's leading administrative decisions. *See* section 2 *infra*. Receivership by definition involves the taking of property rights. This Court should authoritatively resolve whether federal law permits federal agencies to make arbitrary seizures of property.

Ironically, the position successfully advocated in the Eleventh Circuit by the agencies—that the public interest is best served when their decisions are beyond review—threatens to undermine the very financial system the agencies were created to protect. This is particularly so in the savings and loan industry, which nationally has some $730 billion in assets, two-thirds of which are in the hands of federally-chartered institutions. Kaplan, Smith & Associates, *The Kaplan-Smith Report* 3 (Oct. 1983).[12] In the 1980-82 period

[10]The FDIC submitted an amicus brief to the Eleventh Circuit. The OCC and NCUA expressed their views by letters which were included in the Bank Board's Reply and Answering Brief.

[11]Brief for Appellants, No. 83-5654, at 32, 39-40, 69, 71 (*Vermont Yankee*); FDIC Brief at 6 (*Vermont Yankee*); NCUA letter at 3 (*Vermont Yankee*); OCC letter at 2.

[12]When assets of savings banks are included the assets of the thrift industry reach approximately $955 billion. *Id.* The assets of FDIC-insured banks (including national banks) comprise an additional $1.7 trillion, in some 15,412 institutions. Federal Deposit Insurance Corporation, *FDIC Fact Book* 6, 106 (1982).

the entire savings and loan industry nearly foundered, *see supra* p. 4; App. 34-36, as a result of which the Bank Board has actively encouraged associations to raise new capital by the selling of stock in the financial markets. *E.g.*, PX 2, at 2-3.

Such offerings " 'are infusing unprecedented additions of new capital into the thrift industry,' " some $2.7 billion in 1983 alone, compared to $650 million in the entire previous industry history. *FHLBB Cites Unprecedented Capital Gains From Mutual To Stock S&L Conversions*, Wash. Fin. Rep. (BNA), Vol. 42, No. 1, at 16-17 (Jan. 2, 1984). The new capital " 'represents almost 10 percent of the entire net worth of the thrift industry' "; some 80 offerings are in progress and more offerings are expected. *Id.* The new capital has proven to be "of immense help to converting thrifts because of the sharp decline in net worth in recent years. Thrifts are still in need of further capital." Kaplan, Smith, *supra*, at 4.

The *Biscayne* case has been closely watched by the financial markets and major financial publications in the United States.[13] In *Biscayne* alone, the receivership deprived

[13] *E.g.*, Wall St. J., Dec. 19, 1983, at 20, col. 2 (West. Ed.); N.Y. Times, Dec. 17, 1983, § 1, at 29, col. 6; N.Y. Times, Dec. 16, 1983, § D, at 1, col. 6; N.Y. Times, Dec. 4, 1983, § 3, at 14, col. 3; N.Y. Times, Nov. 30 1983, § D, at 1, col. 1; Wall St. J., Nov. 30. 1983, at 20, col. 2 (East. Ed.); Sherrid, *Thrift Theft!*, Forbes, Nov. 7, 1983, at 44-45; N.Y. Times, Sept. 28, 1983, § D, at 26, col. 4; N.Y. Times, Sept. 24, 1983, § 1, at 35, col. 4; N.Y. Times, Sept. 22, 1983, § D, at 3, col. 2; Wall St. J., Sept. 12, 1983, at 7, col. 1 (East. Ed.); N.Y.Times, Sept. 10, 1983, § 1, at 29, col. 1; Wall St. J., Sept. 9, 1983, at 6, col. 1 (East. Ed.); Scheibla, *Mud On The Bank Board*, Barron's, Aug. 29, 1983, at 11, col. 1; Wall St. J., June 10, 1983, at 7, col. 3 (East. Ed.); Wall St. J., June 8, 1983, at 28, col. 3 (East. Ed.); Wall St. J., June 6, 1983, at 14, col. 1 (East. Ed.); N.Y. Times, May 26, 1983, § D, at 15, col. 1; N.Y. Times, May 17, 1983, § D, at 5, col. 4; N.Y. Times, May 14, 1983, § 1, at 32, col. 4; N.Y. Times, April 30, 1983, § 1, at 35, col. 2; N.Y. Times, April 26, 1983, § D, at 16, col. 1; Wall St. J., April 26, 1983, at 11, col. 3 (East. Ed.); Wall St. J., April 19, 1983, at 3 (East. Ed.); Bleiberg, *Biscayne Down The Drain*, Barron's, April 18, 1983, at 11, col. 1; N.Y. Times, April 15, 1983, § D, at 2, col. 1; Wall St. J., April 14, 1983, at 14, col. 2 (East. Ed.); N.Y. Times, April 12, 1983, § D, at 1, col. 3; N.Y. Times, April 9, 1983, § 1, at 31, col. 1; N.Y. Times, April 8, 1983, § D, at 4, col. 1; N.Y. Times, April 7, 1983, § D, at 1, col. 6; Wall St. J., April 7, 1983, at 3, col. 1 (East. Ed.).

some 1,467 shareholders of an ongoing $1.8 billion business having an undisputed $30 million net value. Tr. 1209-10; DX 7, Tab 8, at 43. In September, 1983, *Barron's* independently purchased at its own expense a full page advertisement in the *New York Times*, raising the question presented here: "Who Watches The Watchdogs?" N.Y. Times, Sept. 26, 1983, at A-22. Criticizing the Bank Board's "regulatory arrogance" and "wanton treatment of shareholders," it applauded the trial court decision to set aside the agency action. Another financial publication, *Forbes*, noted the Bank Board is

> actively encouraging institutions to convert to stock ownership and . . . courting investors as a new source of capital for a beleaguered industry. But when push comes to shove, the FHLBB still appears to view shareholders as a nuisance. . . . [I]t couldn't wait to dissolve Biscayne's legal charter to get rid of "the cloud created by a 'stockholder's rights issue.' "

Sherrid, *Thrift Theft?*, Forbes, Nov. 7, 1983, at 45.

A more pointed analysis was ventured by an industry publication after the district court set aside the agency action. *FHLBB May Have to Rethink "Steamroller" Policy After Biscayne Decision*, 8 Savings & Loan Reporter, No. 19, at 1 (Sept. 16, 1983). It explained:

> There are many observers who believe the Bank Board for years has operated under an unofficial policy where it feels it has a free hand to move in on associations under just about any circumstance under the banner of protecting the Federal Savings and Loan Insurance Corporation. ***What the Biscayne lawsuit asked is whether such FHLBB practices can include devious actions, if not outright lies, to S&Ls it deals with.***

> . . . Judge Eugene P. Spellman has taken the unprecedented step of answering a decisive "no," the Bank Board can't lie, despite its broad statutory authority to handle problem thrifts.
>
> . . . [T]here is little doubt the Bank Board will have to reexamine the role its staff officials play in deciding how and which associations will be seized for the good of the FSLIC.

Id. (emphasis added).

The point of the court of appeals' reversal could hardly be clearer. The Board is now free to engage in "a lawless range of power," *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947), at the expense of investors and institutions. The investing public cannot be expected to summon enthusiasm for investment in savings and loan associations—investment the industry desperately needs—knowing the agency is at liberty on whim or caprice to seize the investment, and knowing of the agency proclivity for doing so.

This is not an isolated problem. The "FSLIC estimates that as many as 100 institutions (with assets of about $15 billion) could become technically insolvent by the end of 1984." Comptroller General of the United States, *The FSLIC Insurance Fund—Recent Management And Outlook For The Future* 40 (Oct. 14, 1983). The FDIC reports several hundred banks on its "problem list," and predicts the number of troubled banks will not drop significantly in 1984. Miami Herald, Dec. 15, 1983, at C-1, col. 1; FDIC Brief at 5. Receivership proceedings are by statute or necessity expedited, *e.g.*, 12 U.S.C. § 1464(d)(6)(A), thus creating an acute need for clarity and certainty in the controlling legal principles.

This Court should promptly and authoritatively declare what the law is.

2. **The Decision Below Conflicts With Congressional Intent And This Court's Decisions On The Reviewability Of Administrative Action.**

This Court has established the rule, ignored by the court of appeals, that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (citations omitted). Only if there is "a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141 (citation omitted).

Those rules apply with special force where, as here, the statute expressly provides petitioners a right of review. 12 U.S.C. § 1464(d)(1), (d)(6)(A). Thus, "[t]he right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized." *Barlow v. Collins*, 397 U.S. 159, 167 (1970) (citation omitted). Reviewing other portions of the same statute at issue here—the Home Owners' Loan Act— this Court recently declared a two-pronged general rule of reviewability: "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982) (citation omitted).

The court of appeals failed to conduct the analysis required by this Court's decisions—an inquiry which compels the conclusion that the agency action is reviewable. The operative portions of the statute have been set forth at *supra* p. 12 and App. 167. The Act provides that, "Except as otherwise provided herein, the Board shall be subject to suit . . . by any Federal savings and loan association . . .

with respect to any matter under this section . . .." 12 U.S.C. § 1464(d)(1) (App. 166) (emphasis added). The question, therefore, is whether Section 1464 excludes any aspect of review of a receivership appointment.

Receivership appointments are governed by 12 U.S.C. § 1464(d)(6)(A). As explained at *supra* p. 12, if a receiver is appointed, "the association may . . . bring an action . . . to remove such . . . receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such . . . receiver" 12 U.S.C. § 1464(d)(6)(A) (App. 167). The statute plainly provides for review, in a civil action, "upon the merits," and imposes no limitation on the scope of review or the issues to be raised—a point even the court of appeals conceded. App. 8. Under the teaching of *Barlow v. Collins*, petitioner Biscayne is a member of the class whose interests Congress sought to protect; failure to afford judicial review obstructs the statutory objective. 397 U.S. at 167. The courts will not "'" impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."'" *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981) (citations omitted).[14]

The same result is reached by resort to the congressional history, and by this Court's treatment of the predecessor to the present statute. The original Home Owners' Loan Act authorized the Board to adopt rules for the appointment of receivers, and did not specifically provide for judicial review of a receivership appointment. *Fahey v. Mallonee*. 332 U.S. 245, 249, 250-52 n. 1, 256 (1947). Instead, the association was entitled to a post-seizure administrative hearing by the Bank Board. *Id.* at 256. This Court sustained the Board's receivership rules but left open the question of judicial review, noting under the case law then existing, "The absence

[14]The statute also provides that "The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver." 12 U.S.C. § 1464(d)(6)(A). The effect of that language is to preclude a private creditor from making application to a district court to appoint a receiver under Fed. R. Civ. P. 66.

from the statute of a provision for court review has sometimes been held not to foreclose review." *Id.* (citations omitted).

This Court accompanied its opinion in *Fahey* with caveats important here. Describing the ex parte appointment of a receiver as "a drastic procedure" and "a heavy responsibility to be exercised with disinterestedness and restraint," this Court warned, "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies." *Id.* at 253-54, 256-57. The Court plainly contemplated there would be at least one plenary hearing on all matters pertaining to the receivership appointment, for it concluded,

> It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants . . . that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues . . . .

Id. at 257.[15]

In 1954 Congress amended the statute to provide for judicial review and for a somewhat complicated method to appoint a receiver. Housing Act of 1954, ch. 649, § 503, 68 Stat. 590, 634-37.

In 1966 the statute was comprehensively revised. Financial Institutions Supervisory Act of 1966, Pub. L. 89-695, § 101,

[15]There was more than met the eye. Although nearly half the deposits had left the association as a result of the seizure, in 1948 the institution was returned to its original management and thereafter prospered. *Elliott v. Federal Home Loan Bank Board*, 233 F.Supp. 578, 583-84 (S.D. Cal. 1964), *rev'd on other grounds*, 386 F.2d 42, 44-45 & n. 2 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968). It was seized again in 1960, was again returned to its original management and again prospered. 233 F.Supp. at 584-85. It eventually merged into another institution. *Id.*

80 Stat. 1028-36. A major premise of the revision was that receivership had been used too frequently and inappropriately. The congressional report said seizure of an institution was "too severe for many situations," and was "a drastic remedy . . . employed only as a last resort." S. Rep. No. 1482, 89th Cong., 2d Sess. 5, 6 (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3532, 3536, 3537.

According to the Senate committee chairman, the 1966 legislation was designed to balance two competing interests. *Id.* at 3; 1966 U.S. Code Cong. & Ad. News at 3534-35. One goal was to assure sound financial management. *Id.* The other goal was to protect the interest of savings and loan associations "in receiving fair treatment from the Government, and in receiving a reasonable degree of protection from Government actions which might at times, for one reason or another, [de]generate into arbitrary, capricious, and overbearing tactics." *Id.*

To the same effect was the testimony of the former chairman of the Bank Board:

> When I was involved with this bill or really its forerunner, I heard attorneys say that *an arbitrary or capricious act by a Government agency was always subject to challenge in the courts.* But reliance on such a general procedure alone is not necessary since the bill provides for court review of *all* the critical procedures.
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> * * *
>
> . . . Men can and do act arbitrarily, but the specific safeguards in this bill and *the general safeguard that courts will not tolerate capricious, arbitrary action by Government* should lay this ghost to rest.

Hearings on S. 3158 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency,

89th Cong., 2d Sess., at 107-08 (1966) (testimony of former FHLBB Chairman Joseph P. McMurray) (emphasis added).

Congress struck the balance between the competing interests by giving the Bank Board power to appoint a receiver ex parte, which permits quick agency action, counterbalanced by the present 12 U.S.C. § 1464(d)(1) & (d)(6)(A) which provide, without limitation, for post-seizure judicial review.[16] Congress intended, in terms, to protect against arbitrary and capricious conduct—which is precisely the conduct the district court found to have occurred in this case.[17]

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[16]Courts are particularly well-qualified for such review, for receivership law was originally a judicial creation. *See* 12 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2981, at 4 (1973). The statutory procedure is closely analogous to the ex parte appointment of a receiver by a district court under Fed. R. Civ. P. 66, followed by a plenary hearing on the appointment. *See id.* § 2983, at 27-28.

[17]The due process clause is indirectly implicated in this case. For reasons already stated, petitioners have a statutorily created property interest which may not be divested by arbitrary agency action; it is therefore an interest protected by the Fifth Amendment. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Although petitioners are entitled to a hearing, 12 U.S.C. § 1464(d)(6)(A), the court of appeals excluded from hearing any consideration of the agency's arbitrary and capricious behavior. App. 8. That holding violates this Court's teaching that "[t]he hearing required by the Due Process Clause must be 'meaningful,' . . . and 'appropriate to the nature of the case.' . . . It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." *Bell v. Burson*, 402 U.S. 535, 541-42 (1971) (citations omitted). Despite earlier dictum to the contrary, it is now settled that persons in the position of petitioners may rely on the due process clause to protect such a statutory interest. *Compare Arnett v. Kennedy*, 416 U.S. at 164-68 (Powell and Blackmun, JJ., concurring in part); 177-86 (White, J., concurring in part and dissenting in part); 207-11 (Marshall, Douglas, and Brennan, JJ., dissenting) *with id.* at 152-54 (Rehnquist and Stewart, JJ., Burger, Ch.J.), *quoting Fahey v. Mallonee*, 332 U.S. at 255-56.

The court of appeals apparently harbored constitutional concerns about the agency's action, for it alluded to *Bivens* suits. App. 13. Where Congress has created an entitlement to return of the institution in 12 U.S.C. § 1464(d)(6)(A), a *Bivens* suit is a poor substitute. Petitioners have been deprived of some $30 million in value, *see supra* p. 11 & n. 7, and this court can take judicial notice that individual federal officers, even if not immune from suit, are rarely able to discharge a $30 million liability from their personal resources.

The court of appeals' holding conflicts with this Court's decisions and thwarts the intent of Congress.[18]

3. There Is Conflict Among The Courts Of Appeals And The District Courts On The Reviewability Of A Receivership Appointment For A Financial Institution.

Courts considering the issue of reviewability have reached conflicting results, both under the Home Owners' Loan Act and under the comparable provision of the National Bank Act, as amended, 12 U.S.C. § 1 *et seq.* Review has been found to exist under the receivership provision of the National Bank Act, 12 U.S.C. § 191.[19] *E.g., United States Savings Bank v. Morgenthau*, 85 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 299 U.S. 605 (1936); *B.V. Emery & Co. v. Wilkinson*, 72 F.2d

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[18]Compounding the confusion is the Eleventh Circuit's mistaken belief that 12 U.S.C. § 1729(b) is the "dispositive" statute for federal savings and loan associations like Biscayne. App. 17 n. 11; *see id.* at 2, 4, 6-7. Section 1729(b)(1) provides, in part, "In the event that a Federal savings and loan association is in default, the Corporation [FSLIC] shall be appointed as conservator or receiver . . . ." (App. 170).

The court of appeals apparently assumed that a savings and loan association with negative net worth is in "default," thus triggering a requirement to appoint FSLIC receiver. But "default" is a term of art which "means an . . . official determination of a court . . . or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation." 12 U.S.C. § 1724(d) (App. 170). Section 1729(b) comes into play only after a receiver is appointed under 12 U.S.C. § 1464(d)(6)(A). The functions of Section 1729(b) are first, to specify that only FSLIC is authorized to serve as receiver for a federal association where the Board has determined to appoint one; and second, to delineate FSLIC's powers while acting as receiver. *See* App. 170-71.

Even if the court of appeals had been correct in its reading, Section 1729(b) does not preclude judicial review.

[19]The National Bank Act, as amended, provides in part, "whenever the comptroller [of the currency] shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, . . . appoint a receiver, who shall proceed to close up such association." 12 U.S.C. § 191 (App. 180).

10, 12, 14 (10th Cir. 1934) (reviewable by direct, but not collateral, attack). *See also In re Conservatorship of Wellsville National Bank*, 407 F.2d 223, 228 n.7 (3d Cir.), *cert. denied*, 396 U.S. 832 (1969). There is, however, a division of authority among the courts of appeals, with some opting for unreviewability. The cases are collected in *In re Liquidation of American City Bank & Trust Co., N.A.*, 402 F.Supp. 1229, 1231 (E.D.Wis. 1975) (reviewability is "better view") and *In re Franklin National Bank*, 381 F.Supp. 1390, 1392 (E.D.N.Y. 1974).[*]

National Bank Act precedent was in part relied on in *Washington Federal Savings & Loan Association v. Federal Home Loan Bank Board*, 526 F.Supp. 343 (N.D. Ohio 1981), in which the Bank Board acted under 12 U.S.C. § 1464(d)(6)(A) to appoint a receiver for a federal savings and loan association. Determining to construe 12 U.S.C. § 1464(d)(6)(A) consistently with the National Bank Act, the court said:

> [I]n *United States Savings Bank v. Morgenthau*, 85 F.2d 811, 814 (D.C.Cir. 1936), the court recognized that the Comptroller's decision may be challenged, setting forth the controlling standard of review. The court stated:
>
> > It has been held by a long array of authorities that, where the Comptroller of the Currency has held a bank to be insolvent and has appointed a receiver for it, the court will not substitute its judgment for the judgment of the Comptroller, unless it appears by convincing proof that the Comptroller's action is plainly arbitrary, and made in bad faith.

[*]Also cited in *American City Bank* or *Franklin National*: *Compare Munro v. Post*, 102 F.2d 686, 687 (2d Cir. 1939) *and Wannamaker v. Edisto National Bank*, 62 F.2d 696, 700 (4th Cir. 1933) (unreviewable) *with Schram v. Schwartz*, 68 F.2d 699, 702 (2d Cir. 1934) (reviewable by direct attack) *and Liberty National Bank v. McIntosh*, 16 F.2d 906, 909 (4th Cir.), *cert. dismissed per stipulation*, 273 U.S. 789, 783 (1927) (reviewable for fraud).

No. C80-443, Memorandum and Order at 10 (N.D. Ohio Dec. 18, 1980) (unpublished).[21]

Although the Eleventh Circuit read the published opinion otherwise (App. 11-12), the *Washington Federal* court rejected the notion that the sole question for judicial review is whether a statutory receivership ground exists. 526 F.Supp. at 353-54. Instead, the inquiry was "whether the Board abused its discretion in reaching its opinion that a receiver should be appointed." *Id.* In a somewhat obscure passage, the court announced its abuse of discretion analysis would consist of considering factors subsumed under one or more of the receivership grounds, *id.*, by which the district court meant that there must be a nexus between the receivership grounds and the factors relied on to show abuse of discretion. In the present case, the district court so read *Washington Federal*. *See* App. 26, 130 n.7.

The Eleventh Circuit concluded this was a matter of semantics, and that the sole issue in *Washington Federal* was whether a statutory receivership ground existed. App. 11-12. That reading is clearly wrong, for it is belied by what the *Washington Federal* court actually did. The court first established that one of the statutory receivership grounds existed. 526 F.Supp. at 387-88. The court then addressed whether other factors should have been considered in deciding to appoint a receiver. *Id.* at 388-90; 400-02; *see also id.* at 393-400. A clear example: the court held that if the Board was responsible for the unfavorable condition of the association, this was a relevant factor in determining whether the agency abused its discretion in appointing a receiver. *Id.* at 390. If the Eleventh Circuit's reading were correct, the finding of the existence of one statutory receivership ground would have ended the inquiry. Under *Washington Federal*, as under the *United States Savings Bank* line of National Bank Act cases, the decision to appoint a receiver is reviewable for abuse of discretion.

[21] In the present case, the unpublished opinion was Appendix C-1 to the Bank Board's Brief for Appellants, filed in Case No. 83-5654 in the Eleventh Circuit.

Receivership decisions under 12 U.S.C. § 1729(c)(2) have also been held reviewable. *Fidelity Savings & Loan Association v. Federal Home Loan Bank Board*, 540 F.Supp. 1374, 1378 (N.D. Cal. 1982), *rev'd on other grounds*, 689 F.2d 803 (9th Cir.), *cert. denied*, 103 S.Ct. 1893 (1983).[22] There the trial court ruled that once the statutory prerequisites are met, the court would review "whether the Board's exercise of jurisdiction constituted an abuse of discretion." 540 F.Supp. at 1378. In the present case, the district court followed that reasoning. *See supra* p. 13; App. 26-27.

At trial, the *Fidelity* court determined that two statutory prerequisites had not been met, and ordered the Bank Board to remove the receiver. 540 F.Supp. at 1374-85. Because the threshold receivership requirements had not been met, the district court did not reach the abuse of discretion issue. *See id.* On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Ninth Circuit reversed, holding that the two statutory prerequisites had been met, and remanded "for further proceedings consistent with this opinion and specifically to allow consideration of the question whether any one of the conditions required by 12 U.S.C. §1729(c)(2)(B) existed...." 689 F.2d at 814.

The Eleventh Circuit read that remand restrictively, saying the *Fidelity* district court is permitted only to consider a single issue: the remaining statutory prerequisite. App. 10-11. That is an extraordinary view, for there is nothing whatsoever in the Ninth Circuit opinion to indicate that the abuse of discretion issue was presented or considered in the interlocutory appeal, and the issue was certainly not ripe for appellate review. Although the Eleventh Circuit thought not, its decision conflicts with *Fidelity*.

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[22] Title 12, U.S.C. § 1729 was amended effective Oct. 15, 1982. The version in effect at the time of the receiverships in *Fidelity* and *Telegraph*, *infra*, is set forth at App. 173-75. The current version is found at App. 176-79.

Expressing a contrary view, App. 25-26, is *Telegraph Savings & Loan Association v. FSLIC*, 564 F.Supp. 862 (N.D. Ill. 1981), *aff'd sub nom. Telegraph Savings & Loan Association v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983). There the state commissioner took custody of a state chartered association under state law and the Bank Board, acting under 12 U.S.C. § 1729(c)(2) (App. 173-74), replaced the state receiver with a federal receiver. The trial court held that federal judicial review was confined to the existence of grounds under 12 U.S.C. § 1729(c)(2). The Seventh Circuit affirmed, but was careful to note that the propriety of the initial seizure of the institution by state authorities presented a question of state law to be litigated in state court, "independent of Telegraph's challenge to a federal receivership under federal law." 703 F.2d at 1029-30. *Telegraph* held unreviewable the decision to substitute a federal receiver for a state receiver.

The *Telegraph* rationale for unreviewability has since been undercut by a decision of this Court. *Telegraph* reasoned, in language repeated by the Eleventh Circuit, that "[t]he wisdom of the Board's decision to exercise its power of receivership is an issue that Congress has vested in the Board and that is 'not subject to re-examination in the federal courts under the guise of judicial review of agency action.' " 564 F.Supp. at 875, *quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *see* App. 10. Last Term this Court rejected such an interpretation, saying *Vermont Yankee* cannot be invoked "as though it were a talisman under which any agency decision is by definition unimpeachable." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856, 2870 (1983). *Vermont Yankee* admonishes courts not to reexamine congressional policy choices, 435 U.S. at 557-58, which in that case meant the congressional decision to authorize the use of nuclear energy. *Id.*

The congressional policy choice in the present case was to create a right of judicial review in 12 U.S.C. § 1464(d)(6)(A). Invoking *Vermont Yankee* as a talisman, the Eleventh Circuit has employed the decision to bar the judicial review Congress intended. App. 10.

CONCLUSION

The judgment below immunizes arbitrary and capricious seizures of property from judicial review, contrary to the leading decisions of this Court and the manifest intent of Congress. The decision is of profound importance to the regulatory scheme, the financial markets and the rights of investors.

Petitioners respectfully request that the petition for a writ of certiorari be granted.

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